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## EXPERT PSYCHIATRIC EVIDENCE OF PERSONALITY TRAITS

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Dr. Gregory Zilboorg, the well-known forensic psychiatrist, asserts that the essential fact of the conflict in this country between the criminal law and psychology is the law's active avoidance of any true, psychological understanding of the defendants who come before the courts.<sup>1</sup> He maintains that the law refuses to delve into the behavior characteristics, the personality traits, the deeper motivation of the individual. Though it is not discussed by Zilboorg, one of the prime examples of this refusal would seem to be the orthodox rule of character evidence. As it is almost universally applied, it allows proof of the defendant's character only by evidence of his reputation in his community,<sup>2</sup> and evidence of the actual personality of the defendant is excluded.

Recently, the California Supreme Court in the case of *People v. Jones*<sup>3</sup> made a radical departure from the orthodox rule and allowed the defense to submit expert psychiatric opinion evidence of the actual personality traits of the defendant on the issue of the likelihood that he had committed the crime of sexual abuse of a nine year old child. The case was one of first impression and would seem to be a pioneer decision in this area. It also is one of the first cases in which a

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1. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 14 (1954).

2. 1 WIGMORE, *EVIDENCE* §§ 51-81 (especially § 52) (3d ed. 1940); Udall, *Character Proof in the Law of Evidence—A Summary*, 18 U. CIN. L. REV. 283 (especially 292-93) (1949).

3. 42 Cal.2d 219, 266 P.2d 38 (1954).

psychiatrist has been allowed to testify, basing his opinion in part on a narcoanalysis<sup>4</sup> interview with the defendant.

Professor Judson F. Falknor and Mr. David T. Steffen, of the University of California School of Law, published an article in this *Review*<sup>5</sup> which discussed and criticized the *Jones* case on both of the above issues. Because of the importance of this decision in the new areas of judicial proof, this article is offered as a further discussion of the issues raised.

### THE DECISION

In the *Jones* case, the defendant was charged with a violation of Section 288 of the California Penal Code,<sup>6</sup> which provides:

"Any person who shall wilfully and lewdly commit any lewd or lascivious act . . . upon or with the body . . . of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony . . . ."

The State accused Jones of committing such acts on two occasions with respect to his nine year old niece, Carol. She testified that in addition to the acts charged in the information, the defendant had committed similar acts "lots of days"; had shown her four books containing pornographic pictures and writings on one occasion when such acts occurred; and another time tried to get her to engage in acts "denounced by section 288a of the Penal Code"<sup>7</sup> (perversion-fellatio).

The child made no complaints about these alleged acts while living with the Jones'. However, a few days after going to live with

4. The term *narcoanalysis* is descriptive of the method of interview or analysis where the patient is given a chemical injection, sometimes called "truth serum," and is examined and questioned while under the influence of the drug. The examination is called narcoanalysis or pharmacanalysis and the treatment is called narcosynthesis or pharmacosynthesis. Sodium pentothol was the drug used in the *Jones* case. Other drugs used to produce the desired effect are sodium amytal, metrozol and scopolamine. The drug produces a depressing effect on the central nervous system function, and the patient is questioned while in a state of semi-consciousness. In this state, the patient experiences a relative freedom from repressive influences, anxieties, or inhibitions. His inner personality comes to the surface in remarkable candor. This candor usually carries over and produces the effect of making the patient's answers to questions free from lies or reluctant half-truths. The persons most responsive to such treatment would seem to be those who need it most—the neurotic and otherwise mentally disturbed. See SARGANT & SLATER, AN INTRODUCTION TO SOMATIC METHODS OF TREATMENT IN PSYCHIATRY (1944); Muehlberger, *Interrogation Under Drug Influence*, 42 J. OF CRIM. L. & CRIMINOLOGY 513 (1951); Kubie & Margolin, *The Therapeutic Role of Drugs in the Process of Repression, Dissociation and Synthesis*, 7 PSYCHOSOMATIC MED. 147 (1945); Bleckwenn, *Narcosis as Therapy in Neuropsychiatric Conditions*, 95 J.A.M.A. 1168 (1930).

5. Falknor & Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist"*, 102 U. OF PA. L. REV. 980 (1954).

6. CAL. PEN. CODE § 288 (1949).

7. 42 Cal.2d at 221, 266 P.2d at 40.

another aunt and uncle, she told them of these alleged acts and asserted that she made no complaint while living with the Jones' because the defendant had threatened to spank her.

The defendant denied on the witness stand having committed such acts in regard to Carol. He testified that he had never shown her any pornographic books, but he admitted having "eight or nine pictures of nude women in his bedroom."<sup>8</sup> Jones testified, "and his wife agreed,"<sup>9</sup> that their sexual relationship was satisfactory. To the contrary, Jones' mother-in-law testified that he had complained that his wife did not satisfy him sexually. There was also character evidence that Jones had a good reputation for morality in the community in which he resided.<sup>10</sup> Mrs. Jones said that Carol's "reputation for truth and veracity was bad."<sup>11</sup>

Jones was convicted and put on probation for five years on certain conditions, one being that he serve one year in the county jail. His principal ground of appeal was the refusal of the trial court to admit the expert psychiatric testimony of Dr. James Solomon, a psychiatrist with most imposing qualifications.<sup>12</sup> An offer of proof was made to the extent that Dr. Solomon would testify that, at the request of Jones' attorney, he had examined Jones on two occasions, once without drugs and once

"with the aid of a drug known as sodium pentathol (sic); that as a result of those examinations he reached the conclusion that Mr. Jones is not a sexual deviate and he is incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and a half years of age."<sup>13</sup>

Both the trial court and the California Supreme Court interpreted this offer of proof as intended to show, not the absence of a specific intent, but that Jones was of a "normal state of mind" and therefore not "prone to commit such an act."<sup>14</sup>

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8. *Id.* at 222, 266 P.2d at 41.

9. *Ibid.*

10. *Ibid.*

11. *Ibid.*

12. Dr. Solomon was a diplomate of the American Board of Psychiatry and Neurology (the specialty board for psychiatrists); was a graduate of the University of Illinois College of Medicine; had trained at Cedars of Lebanon Hospital, Boston Psychopathic Hospital, and Massachusetts General Hospital (at which time he was also an assistant in neurology at Harvard Medical School); had devoted the past six years to specialty practice in psychiatry in Los Angeles and was on the staff of a number of hospitals; and was an independent medical examiner for the State Department of Mental Hygiene, the Los Angeles Psychiatric Court, and State Industrial Accident Commission.

13. 42 Cal.2d at 222, 266 P.2d at 41.

14. *Id.* at 222-23, 266 P.2d at 41-42.

The supreme court, reversing the trial court's ruling and ordering a new trial, asserted:

"In the determination of probabilities of guilt, evidence of character is relevant . . . . The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged.'" <sup>15</sup>

The court further asserted that the state's sexual psychopath laws <sup>16</sup> which provide that a person convicted of acts such as those with which Jones was charged must be given a psychiatric examination to determine whether or not he is a "sexual psychopath," and if so, provide for hospitalization and treatment, evidence a "legislative determination" that persons found to be sexual psychopaths are "more likely to violate section 288 than one who has no such propensity . . . ." <sup>17</sup>

In so finding, the supreme court refused to follow a district court of appeal case, *People v. Sellers*, <sup>18</sup> in which defendant was charged with a crime of homosexual perversion and where the court rejected expert psychiatric evidence offered by the defendant to the effect that he was not a homosexual. The supreme court stated:

"The reasoning of that case overlooks the accepted fact that homosexual acts of the nature there considered constitute abnormal conduct indulged in by persons with a propensity for it; normal individuals ordinarily do not resort to such acts, hence a showing of sexual normality in that respect has relevancy to the nonperformance of homosexual acts." <sup>19</sup>

Professor Falknor and Mr. Steffen viewed the decision as "a radical departure from orthodox doctrine which limits proof of character to reputation evidence." <sup>20</sup> The authors attempt a defense of the orthodox doctrine. They also view the decision as unfortunate in allowing expert psychiatric testimony in this regard because: (1) it was based on only two examinations, and (2) in one of these, the psychiatrist used a drug known as sodium pentothol which Falknor and Steffen term a "truth serum." <sup>21</sup>

15. *Id.* at 223, 266 P.2d at 42. The latter quote by the court is from the 1876 case of *State v. Lee*, 22 Minn. 407, 409 (1876), one of the few American decisions contrary to the general rule of character evidence.

16. CAL. WELF. & INST. CODE §§ 5500-5521 (1952).

17. 42 Cal.2d at 224, 266 P.2d at 42.

18. 103 Cal. App. 2d 830, 230 P.2d 398 (1951).

19. 42 Cal.2d at 225, 266 P.2d at 43.

20. Falknor & Steffen, *supra* note 5, at 982.

21. *Id.* at 991.

Before proceeding to a discussion of the decision on the merits of these arguments, some added factors should be injected here. Through correspondence with the defense attorney in the *Jones* case, the writer has learned that the re-trial of Jones has resulted in conviction. However, Jones was given a somewhat lighter sentence, being placed on probation without a jail sentence. The judge in the second trial heard the case without a jury. He considered the case on the record of the first trial plus the expert testimony of Dr. Solomon and another psychiatrist who testified as witnesses for the defendant to the effect that Jones was not a sexual psychopath or sexual deviate.<sup>22</sup>

#### CHARACTER EVIDENCE AND PERSONALITY TRAITS

Taking the objections of the authors of the previous article in order, the first is that the instant decision violates the "orthodox rule" on character evidence.<sup>23</sup> The authors state<sup>24</sup> that the general rule is: "evidence of . . . character is . . . confined to . . . general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation, is inadmissible . . . ; as Mr. Justice Jackson put it in *Michelson v. United States*:<sup>25</sup> 'The witness may not testify about defendant's . . . possession of a particular disposition or of benign mental or moral traits . . . . The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood.'"<sup>26</sup>

It is not entirely clear that the ruling in *Michelson* excludes expert psychiatric evidence of personality as it does lay testimony based on personal acquaintance, but without stressing the distinction, it is not here denied that the holding is the strong majority rule in the United States.<sup>27</sup> The rule makes "character" and "reputation" synonymous, or, better stated, it allows proof of character only by evidence of reputation in the community.

It is here submitted that the orthodox rule has little to support it, either in logic or in justice. It seems clear that there is an essential difference between the reputation of an individual and his actual char-

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22. The writer has not been able to procure a transcript of the testimony of Dr. Solomon but has received as a result of personal correspondence with Mr. Ross, defense attorney in the *Jones* case, and with Dr. Solomon, an indication of the substance of that testimony. Various pertinent parts of it will be discussed in portions of this article as it seems to throw light on the discussion.

23. Falknor & Steffen, *supra* note 5, at 982.

24. *Ibid.*

25. 355 U.S. 469 (1948) (Footnote renumbered).

26. *Id.* at 477 (Footnote added).

27. McCORMICK, EVIDENCE § 158 (1954).

acter, personality, and "moral or psychical *disposition*." <sup>28</sup> Except in those cases where "reputation" is actually in issue, as in defamation, evidence of character is offered in regard to the person's propensities toward certain actions. Certainly community reputation is some evidence in this regard, but it is admittedly weak. The early English common law allowed proof of actual personality traits and often excluded evidence of reputation.<sup>29</sup> Character was thus defined as referring to actual qualities of the person, and was often stated as "general character" to distinguish personality traits from evidence of particular acts of the person.<sup>30</sup> The turning point of the common law seems to have come in 1809 in *Jones' Trial*<sup>31</sup> where Lord Ellenborough alluded to the concept of reputation to exclude evidence of particular acts offered to show personality traits.

From this background we have the present-day rule—much maligned and little defended. It receives from Wigmore this commentary:

"The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.' " <sup>32</sup>

It is clear that Wigmore was deploring the law's refusal to hear the opinions of intimate personal friends. Falknor and Steffen allude to this in their article.<sup>33</sup> They indicate possible agreement with Wigmore that such testimony may be "useful," <sup>34</sup> but they express their skepticism at "extending the relaxation" <sup>35</sup> of the orthodox rule to admit expert psychiatric evidence. Certainly Wigmore does not indicate such a distinction. If any should exist, one might expect it to be just the opposite. As far as weight is concerned, the evidence of

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28. The latter phrase is Wigmore's. See 1 WIGMORE, EVIDENCE § 52 (3d ed. 1940).

29. Trial of James O'Coigly, 27 How. St. Tr. 1, 39 (1798); Trial of Thomas Hardy, 24 How. St. Tr. 199, 999 (1794); Case of Cowper, Marson, Stephens & Rogers, 13 How. St. Tr. 1190 (1699).

30. Trial of Thomas Hardy, *supra* note 29; Trial of Christopher Layer, 16 How. St. Tr. 94, 246 (1722).

31. Trial of Valentine Jones, 31 How. St. Tr. 251, 310 (1809). It seems ironic that this case should have the same name as the instant case.

32. 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

33. Falknor & Steffen, *supra* note 5, at 986.

34. *Ibid.*

35. *Id.* at 987.

a psychiatrist as to a person's personality traits should be more valuable to a jury's deliberations than the glowing praises of his personal friends.

Of the orthodox rule Justice Cardozo said in *The Nature of the Judicial Process*:

"The one thing that any sensible trier of facts would wish to know above all others in estimating the truth of his defense, is held by an inflexible rule, to be something that must be excluded from the consideration of the jury. . . . Here, as in many other branches of the law of evidence, we see an exaggerated reliance upon general reputation as a test for the ascertainment of the character of litigants or witnesses. Such a faith is a survival of more simple times. It was justified in days when men lived in small communities. Perhaps it has some justification even now in rural districts. In the life of great cities, it has made evidence of character a farce. Here, as in many other branches of adjective law, a spirit of realism should bring about a harmony between present rules and present needs."<sup>36</sup>

The authors also note that both the Model Code of Evidence<sup>37</sup> and the Uniform Rules of Evidence<sup>38</sup> would allow opinion evidence as to the personality traits of an individual.<sup>39</sup> In the face of this, the authors cite with apparent approval the language of Justice Jackson in the *Michelson* case:<sup>40</sup>

"much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."<sup>41</sup>

Though Justice Jackson said it well, this seems no more than a shallow rationalization of the status quo—which is neither "balanced," nor "workable," nor just. In fact, the common practice of the courts today in regard to the general rule is enough to point out its ineffectiveness. In most areas, the rule is so shrouded in the technicalities of hearsay and what a witness can and cannot say that it has been brought down to a formula of questions and answers such as: "Q: And what

36. SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 173-74 (Hall ed. 1947).

37. MODEL CODE OF EVIDENCE rule 306 (1942).

38. UNIFORM RULES OF EVIDENCE rules 46, 47 (1953).

39. Falknor & Steffen, *supra* note 5, at 987.

40. *Id.* at 993-94.

41. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

is the reputation of *D* in the community? (or as regards veracity, morality, etc.) A: His reputation is 'Good' or 'Bad.'". The technicalities are so dense that the interrogator is afraid to allow a witness more than this almost meaningless answer to an almost meaningless question. We need go no further than the *Jones* case itself in which the court cites evidence of Jones' "good reputation for morality in the community" and Jones' wife's testimony that the child's "reputation for truth and veracity was bad."<sup>42</sup>

Before examining the offer of proof by Jones' counsel, we might note two other pieces of evidence in the case which undoubtedly would influence a fact-finder in his verdict. They are: (1) the fact that Jones admitted having eight or nine pictures of nude women in his bedroom, and (2) the evidence of his sex life with his wife. All of the people to whom I have spoken in regard to this case have been impressed by these factors, but actually, what are they? They are objective signs of Jones' personality traits. Falknor and Steffen express no objection to their admission into evidence. Yet, the offer of proof by the defense was no more than an attempt to expand on the same type of evidence—through expert psychiatric examination and evaluation.

Taking specifically the case before us, should expert psychiatric evidence have been accepted where the defendant was charged with lewd and lascivious conduct in regard to a nine year old child? Recall that the child testified that these acts occurred a number of times and included inducements to commit perverse acts of fellatio. First of all, there is little doubt but that the general public views such conduct as evidencing mental abnormality.<sup>43</sup> The fact of the enactment of "sexual psychopath" laws<sup>44</sup> in many states in recent years indicates the high incidence of belief that those who commit these crimes are abnormal. At least in the case of perversions and sexual advances by adults on young children, the medical profession seems clearly to agree with this conclusion.<sup>45</sup> The psychiatrist may determine that the person who commits this type of act is a "sex deviate" because he is: (1) a psychotic, (2) a psychoneurotic, (3) a psychopath, (4) a mental de-

42. 42 Cal.2d at 222, 266 P.2d at 41.

43. See, e.g., Satterfield, *The Education of a Metropolitan Police Department Respecting Sex Molestation*, 42 J. CRIM. L. & CRIMINOLOGY 403, 405 (1951).

44. A collection of these statutes may be found in Falknor & Steffen, *supra* note 5, at 982 n.5.

45. See PLOSCOWE, *SEX AND THE LAW* (1951); Karpman, *The Sexual Psychopath*, 42 J. CRIM. L. & CRIMINOLOGY 184 (1951); Roth, *Factors in the Motivation of Sexual Offenders*, 42 J. CRIM. L. & CRIMINOLOGY 631 (1952). It should be noted that the latter writer has not taken the position that all sex crimes and sex offenders can be so classified. *Id.* at 633. This is the major area of disagreement about the concept in sexual psychopathology and the law. See, e.g., Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543, 548-54 (1950).



fective or (5) an alcoholic (with some other underlying psychopathology). It is quite well settled in psychiatry that these five syndromes will embrace the great majority of all sex offenders.<sup>46</sup> In terms of the law, the personality traits or disposition to commit the acts here concerned, abuse of a young child in the *Jones* case and homosexuality in the *Sellers* case, can be determined to a high degree of probability by expert psychiatric examination. To give logical relevance to the evidence, this is all that is needed.<sup>47</sup> The tests need not be foolproof in all cases.

The California Supreme Court clearly arrived at this conclusion. It used the state sexual psychopath laws as indicative of the acceptance of the probative value of such evidence. If such a psychiatric examination *after conviction* of the same crimes could result in the commitment of a person to a mental institution for treatment and perhaps for life because of such personality traits,<sup>48</sup> then certainly the court should allow such an examination *before conviction* to show that these traits are absent.

Granting the probative value of such evidence, what are the problems it creates for the courts?

In the first place, such evidence as that submitted by Jones is of a negative diagnosis, *i.e.*, that Jones is *not* a sex deviate or sexual psychopath. Such a conclusion is of limited significance either in psychiatry or in law. It is more difficult to test the quality of a negative diagnosis than a positive one and it is more difficult to refute. As far as the court is concerned, it has limited significance because it cannot be denied that a given individual could have and might have committed the sex crimes charged and yet not be a sex deviate or sexual psychopath. However, both of these objections go to the weight of the evidence, not to its relevancy and admissibility.

Falknor and Steffen question the offer of proof of Jones in that it indicated that Dr. Solomon was going to testify that Jones was not a "sexual deviate."<sup>49</sup> The latter term is quite well accepted in psychiatry as applied to a personality disorder in which the person derives major satisfaction from unconventional or unnatural modes of sexual gratification.<sup>50</sup> The trial court and supreme court construed "sexual

46. DAVIDSON, FORENSIC PSYCHIATRY 106 (1952).

47. This certainly is the ground for admitting evidence of "community—reputation" under the orthodox rule. As regards relevance, at least, no quarrel should be made in regard to actual personality characteristics. See 1 WIGMORE, EVIDENCE §§ 52, 55, 56 (3d ed. 1940).

48. CAL. WELF. & INST. CODE §§ 5511.7, 5512 (1952).

49. Falknor & Steffen, *supra* note 5, at 988.

50. The term is used in AMERICAN PSYCHIATRIC ASS'N, DIAGNOSIS AND STATISTICAL MANUAL OF MENTAL DISORDERS (1952); WORLD HEALTH ORG., MANUAL OF THE INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES (6th rev. ed. 1948); STANDARD NOMENCLATURE OF DISEASES AND OPERATIONS (4th ed. 1952).

deviate" as equivalent to the term "sexual psychopath,"<sup>51</sup> as it appears in the California code.<sup>52</sup> Without reference to the medical meaning or the legal meaning of either term, the authors ask, however, whether the term means that the defendant "never 'deviated,' " or, that he had "no desire to 'deviate.' " <sup>53</sup> They assert that the distinction is important because the "orthodox doctrine" forbids proof of character by specific instances of good or bad conduct.<sup>54</sup>

It does not seem that the *Jones* decision requires that Dr. Solomon answer in either alternative suggested by the authors. The Court indicates that Dr. Solomon's expert opinion is to be admitted in relation to Jones' mental condition and his personality traits.<sup>55</sup> It may exclude any evidence of specific acts committed by Jones. It may, therefore, limit the psychiatrist to testimony in more general terms of his conclusions in regard to the personality traits of Jones. It may, on the other hand, allow direct and cross examination to test the quality and value of Dr. Solomon's opinion by questions in regard to details of the consultations with Jones. In part of this examination, the psychiatrist may be made to reveal some of the answers to the questions, including an indication of Jones' answers to direct questions about specific acts. These should be admissible, since they are not admitted to prove the truth of these statements, but to test the value of the psychiatrist's opinion. As to the alternate query of the authors, whether Dr. Solomon would testify that Jones had "no desire to 'deviate,' " this is an oversimplification, at the least, of what Dr. Solomon is called upon to do. The question is whether or not Jones has the particular psychological characteristics generally known to psychiatrists to enable Dr. Solomon to classify him as a sexual psychopath—with all of the many implications such a classification carries.

As previously indicated,<sup>56</sup> the writer has been unable to obtain a transcript of Dr. Solomon's testimony at the re-trial, but in his letter Dr. Solomon indicates that he was allowed to present "the substance of my examination" <sup>57</sup> and his conclusions in regard to Jones. This included the "history of his life," Dr. Solomon's "observations of him

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51. 42 Cal.2d at 226, 266 P.2d at 43.

52. CAL. WELF. & INST. CODE § 5500 (1952), defining a sexual psychopath as a person "who is affected, in a form predisposing to the commission of sexual offenses, and in a degree constituting him a menace to the health or safety of others, with any of the following conditions: (a) Mental disease or disorder, (b) Psychopathic personality, (c) Marked departures from normal mentality."

53. Falknor & Steffen, *supra* note 5, at 991.

54. *Ibid.*

55. 42 Cal.2d at 224-25, 266 P.2d at 43.

56. See note 22 *supra*.

57. Letter from Dr. James Solomon, to the author, Feb. 11, 1955, on file Biddle Law Library, University of Pennsylvania Law School.

and his responses" in both interviews. Dr. Solomon writes that by the term "sex deviate" he meant a person who acquires sexual satisfaction from other than "heterosexual activity considered appropriate and acceptable for their age group, including consideration of society's requirements. For example, a homosexual is a sexual deviate; an adult who sexually stimulates a child and/or himself or herself in the presence of a child is a sexual deviate . . . ." It is clear from this statement that the court was correct in taking Dr. Solomon's phrase as indicative of the classification into which he would place a person who does commit acts of the nature with which Jones was being charged. Under the California law,<sup>58</sup> such a person is a "sexual psychopath." Dr. Solomon, therefore, was going to testify specifically that Jones did not have the identifiable personality traits of this type of person, that is, one who would abuse young children.

Dr. Solomon also writes that in cross examination he was asked

"a specific question utilizing the phraseology which Mr. Ross (defense attorney) had used in his appeal to the California Supreme Court. Mr. Ross had stated, apparently, that my testimony 'would have shown that Mr. Jones was *incapable*' of the crime for which he was being tried. The judge and the prosecutor seemed to me to emphasize this word, *incapable*. They asked first was Mr. Jones *incapable* of the crime. I had difficulty in answering that question conclusively because it is my opinion that anyone is capable of anything . . . I gave the answer that it was *unlikely* that Mr. Jones would commit the crime, or had committed the crime. However, it is my impression that the final adjudication in their minds was based on my inconclusive answer. A question of semantics arises; namely that I do not think Mr. Ross meant to say that it was impossible when he used the word *incapable*, but that he meant improbable. In fact, I encountered the judge's ire by asking him if he meant the word incapable to mean impossible or improbable. He answered, obviously irritated, something to the effect that it meant definitely impossible."<sup>59</sup>

The questioning in regard to "capacity" would seem to have been in relation to Jones' offer of proof in the first trial that Dr. Solomon would testify that Jones was "not a sexual deviate and he is incapable of having the necessary intent to be lustive . . . ." <sup>60</sup> As pointed out previously, the court took this to mean that Jones had a normal

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58. CAL. PEN. CODE § 288 (1949).

59. Letter from Dr. James Solomon, to the author, Feb. 11, 1955, on file Biddle Law Library, University of Pennsylvania Law School.

60. 42 Cal.2d at 222, 266 P.2d at 41.

mind and normal personality and thus was not likely or prone to commit the crimes with which he was charged. Of course, if Dr. Solomon's recollections are correct, and he was questioned as to Jones' capacity or ability to commit the crimes, his answers should not have damaged the defense's case—though it may not have helped it. The testimony in this regard does point up, however, the tendency of courts to force medical witnesses to testify in black or white terms, even though these terms may produce very inconclusive results.

In the instant case, the psychiatric testimony would seem to have had little influence on the final decision. Jones was found guilty even though Dr. Solomon and a second psychiatrist testified he was not a sexual deviate or sexual psychopath. The court may have been influenced by many factors, including the following: (1) even though Jones might not have been a sexual psychopath, he could still have committed the crime; (2) there was other evidence in the case, particularly Jones' admission that he had in his bedroom eight or nine pictures of nude women, indicating he might well have had personality traits in this direction; (3) the child's testimony does not seem to have been shaken; (4) the psychiatrists might have been mistaken in their diagnosis; (5) they were called as witnesses for the defense.

If some of the above factors were changed, additional problems created by allowing such testimony as that in the *Jones* decision will come to light. For example, would the prosecution be allowed to submit direct evidence in its case in chief that a defendant charged with a similar crime is a sexual psychopath? Or, would the prosecution be allowed in the *Jones* case to submit rebuttal evidence to that effect? The ready answer to the first question would seem to be "no," if analogy is made to the orthodox character rule.<sup>61</sup> The Model Code of Evidence and the Uniform Rules of Evidence, which would agree with the *Jones* decision, would not allow the prosecution to submit direct evidence of "bad" personality traits.<sup>62</sup> The reason for exclusion under the orthodox rule has been variously given as the "sporting instinct of Anglo-Normandom";<sup>63</sup> the requirement that "crime must be proved, not presumed . . . and the most vicious is presumed innocent until proved guilty";<sup>64</sup> and the fear of the possibility that some

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61. See *Michelson v. United States*, 335 U.S. 469, 475-79 (1948); 1 WIGMORE, EVIDENCE § 57 (3d ed. 1940).

62. MODEL CODE OF EVIDENCE rule 306(1)(a) (1942); UNIFORM RULES OF EVIDENCE rule 47 (1953).

63. 1 WIGMORE, EVIDENCE § 57 (3d ed. 1940).

64. *People v. White*, 24 Wend. 520, 574 (N.Y. 1840).

juries might find a defendant guilty in order to punish "the bad man" for his past offenses even though the jury is not convinced he committed the particular crime with which he is then being charged. To some extent, the present issue can be distinguished from this "orthodox rule." The evidence of personality traits is not evidence that the defendant is a "bad man," *i.e.*, of bad moral character. It is evidence generally, that he is a *sick* man. Of course, this latter term, "sick man," actually has many meanings. It can be sickness in terms of "disease," or "defect"; and it can be defined in terms of whether or not it is a condition which can be "cured."<sup>65</sup> Throughout this article we have been describing it as a personality trait, identifying the phrase with the concept of psychological characteristics and behavior patterns. Is this a sufficient distinction to allow the prosecution to offer direct evidence on it? Of course, the evidence is relevant, but this is admittedly true in the case of the exclusion under the orthodox rule. It is actually of greater probative force than in most other cases, since a "disposition" to commit this type of crime is much more psychologically identifiable than any other. And yet, the basic reasons for excluding such evidence under the orthodox rule would seem to exist here in great force. A jury might well be severely prejudiced against the person and want him "locked up for good" because of his propensities. They may see little distinction between hospitalization and incarceration by conviction. The fact that they may be convicting the man of a crime he did not commit, and, furthermore, adding to the difficulties of curing him, may carry little weight with them. Exclusion of the evidence under the orthodox rule is usually on the basis that it is "remote and prejudicial." If this statement can be taken as a clear expression of policy, the decision on admitting this type of evidence by the prosecution in its direct case will turn on a weighing of its admitted probative value against its prejudicial effect in the particular trial.

On the question of whether or not the prosecution could offer expert psychiatric evidence to rebut the defense's evidence that Jones was not a sexual psychopath, the answer would be "yes," if the orthodox rule is again taken as an analogy.<sup>66</sup> The prosecution could not

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65. See particularly a discussion of these concepts in terms of mental illness in the recent case of *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954); see also Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. OF PA. L. REV. 378 (1952).

66. See 1 WIGMORE, EVIDENCE § 58 (3d ed. 1940); *United States v. Holmes*, 26 Fed. Cas. 349, 354, No. 15382 (C.C.D. Me. 1858); *cf. Mackreth v. United States*, 103 F.2d 495, 496 (5th Cir. 1939). The MODEL CODE OF EVIDENCE rule 306(1)(b) (1942) and the UNIFORM RULES OF EVIDENCE rule 47 (1953) would support this view.

offer evidence of the commission of particular criminal acts to show this propensity, under the orthodox rule, but again these might be admitted in cross examination to test the quality of the psychiatrist's opinion (particularly since they would be brought out in response to the defendant's own questioning).

Should this evidence be admitted under either of the procedures outlined above, it would throw a heavy burden on the defense because of its greater probative value over the negative diagnosis in the *Jones* case. Unless the defendant can avail himself of other evidence, such as an alibi, the case may turn into the well-known "battle of experts" with the fact finder in the difficult position of deciding between equally impressive medical experts holding categorically opposite opinions.

The solution here may be in the use of court-appointed, neutral experts who would examine every person charged with certain sex crimes. It could be done through examinations or through hospital observation for a period of time. Such a system has been suggested in the sexual psychopath laws of some states.<sup>67</sup>

There is yet another issue before the court if it allows evidence to be submitted that the defendant is a sexual psychopath. Under some state sexual psychopath laws, he could be hospitalized immediately at that point without further proceedings.<sup>68</sup> Under other sexual psychopath laws the defendant, if convicted, would not be imprisoned but would then be hospitalized.<sup>69</sup> In states having no such special laws,

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67. Ind. Acts 1949, c.124; MICH. STAT. ANN. §28.967 (Supp. 1947); MINN. STAT. ANNOTATIONS §526.10 (1947). This was formerly the case in Massachusetts under MASS. ANN. LAWS c.123A, §2 (1949) inserted by Mass. Acts 1947, c.683. The statute was changed to a post-conviction examination by Mass. Acts 1954, c.686, §1; see MASS. ANN. LAWS c.123A, §3 (Supp. 1954). For a discussion of the new Massachusetts legislation, see 1954 ANNUAL SURVEY OF MASS. LAW §15.11. The 1954 amendment provides that it shall become operative when a treatment center is adequately staffed to carry out its purpose. Mass. Acts 1954, c.686, §2. Under the famous Briggs Law in Massachusetts there is a mandatory examination and report to the court by the State Department of Mental Health in regard to all persons charged with certain major crimes. MASS. ANN. LAWS c.123, §100A (1949); see Overholser, *The Briggs Law of Massachusetts*, 25 J. CRIM. L. & CRIMINOLOGY 859 (1935).

68. See the statutes cited in note 67 *supra*.

69. All of the sexual psychopath laws assume, at least, that the person will be hospitalized. Some of the statutes make specific provision for hospitalization and some go further in requiring some type of treatment. See particularly, MASS. ANN. LAWS c.123A, §3 (Supp. 1954) (commitment to a "treatment center" for such persons in the Department of Mental Health); CAL. WELF. & INST. CODE §5512 (1952). In practice, there are some states which do not seem to have psychiatric facilities for persons so committed. See Tappan, *The Habitual Sex Offender*, NEW JERSEY LEGIS. COMM. REP. (1951). Professor Tappan asserted at that time that none of the states having such commitment laws was even attempting to give psychiatric treatment to these persons. In Michigan, a case carried to the supreme court revealed that these unfortunates were being placed in the state prison under the same conditions as prisoners. They were in a separate cell block and were called "visitors." *In re Kemmerer*, 309 Mich. 313, 15 N.W.2d 652 (1944).

the defendant would probably be incarcerated,<sup>70</sup> unless he were found legally irresponsible on an irresistible impulse test,<sup>71</sup> the *New Hampshire* rule,<sup>72</sup> or the recent *Durham* case<sup>73</sup> in the Federal courts.

In their article, Falknor and Steffen conclude in relation to this aspect of the case with a question which they seem to regard as a very strong argument against the conclusions reached in *People v. Jones*. They ask, "And if expert opinion is to be received that defendant is not a 'sexual deviate' or a 'homosexual,' on what principle may there be excluded psychiatric opinion that he is not a 'thief,' a 'robber' or a 'murderer'?"<sup>74</sup>

The answer, it seems to this writer, is that if the courts become convinced that definite personality traits, such as those generally recognized in sex deviates and homosexuals, are developed, isolated, and classified by medical science in regard to other types of crimes, then such evidence *should* be admitted. At present the courts rely on an "eye witness" who may have caught a glimpse of a human face; on the fact that "the defendant's reputation in his community is bad"; and on many tenuous threads of evidence to aid in convicting a defendant of murder, rape, burglary, sodomy and other crimes. Here, we are leaving the door of the courtroom open for advances in medical science to show us the means of bringing our system closer to reality and truth.

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70. *McNaghten's Case*, 10 C.L. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). See HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 477 *et seq.* (1947); WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 32 *et seq.* (1933).

71. It is claimed that some sixteen states and the District of Columbia have adopted some form of irresistible impulse test. California is not one of these. See WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 29-73, 102-03 (1954); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 505-26 (1947). The difficulties in the application of this "test" are beyond the scope of this article. There is no doubt, however, that such a defense is often attempted in sex cases, particularly those involving perversion. See DAVIDSON, *FORENSIC PSYCHIATRY* 11 *et seq.* (1952).

72. *State v. Jones*, 50 N.H. 369 (1871); *State v. Pike*, 49 N.H. 399 (1870).

73. *Durham v. U.S.*, 214 F.2d 862 (D.C. Cir. 1954). The problems in application of the New Hampshire and District of Columbia rule are beyond the scope of this article. Discussions of the *Durham* case in the law reviews have indicated that certain types of psychopathic personality may be included in the definition of "mental disease or defect" which will relieve the defendant of criminal responsibility. See particularly the article by Dr. Frederick Wertham in which he alludes to a case of sexual abuse of a minor child by an adult with an "infantilistic fixation on children as sex objects." Dr. Wertham indicates such a case might be included in "mental disease or defect" under the *Durham* case. It should be noted, however, that Dr. Wertham expresses his disapproval of the *Durham* case and would find such a person responsible unless he suffers from a psychosis. Wertham, *Psychoauthoritarianism and the Law*, 22 U. OF CHI. L. REV. 336, 337 (1955). See a symposium of articles on the *Durham* case in 22 U. OF CHI. L. REV. 317-404 (1955). See also Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25 (1955).

74. Falknor & Steffen, *supra* note 5, at 990.

EXPERT PSYCHIATRIC OPINION EVIDENCE OF PERSONALITY TRAITS  
AS A RESULT OF CONSULTATION AND NARCOANALYSIS

Falknor and Steffen also criticize the court in the *Jones* case for allowing the particular evidence of Dr. Solomon because (1) his opinion was based on only two examinations and (2) in one of these, the psychiatrist used a drug known as sodium pentothol.<sup>75</sup>

The authors are correct in challenging the value of a psychiatrist's opinion where it is based on only two consultations. However, the challenge is valid only in regard to weight, not relevancy, or admissibility. It is, of course, always better if an examination can be conducted under ideal conditions: for example, under observation in a hospital over a period of time and with the aid of psychologists, psychometrists, psychiatric social workers, and others. However, the opinions of psychiatrists are accepted in the courts all over the country when based on only one consultation. It is said by Davidson in his recent book that experienced court examiners reach their diagnosis after a single interview in 90 or 95 percent of the cases, even when they have an opportunity to request further consultation.<sup>76</sup>

But Dr. Solomon went further; in addition to a standard consultation, he conducted another examination with the aid of sodium pentothol, or by "narcoanalysis."<sup>77</sup> Under the influence of the drug, properly administered and controlled, the patient releases pent-up inhibitions and will reveal previously concealed *personality characteristics*.<sup>78</sup> The answers of a person under this influence are usually true, but not always so.<sup>79</sup> However, truth is not a necessity when the aim is to use the treatment as a method of psychiatric examination, diagnosis and therapy. That was the aim in the *Jones* case. The method is a well-accepted procedure in psychopathology and psycho-

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75. *Id.* at 987, 991.

76. DAVIDSON, *FORENSIC PSYCHIATRY* 35 (1952).

77. Falknor and Steffen did not use the term narcoanalysis in their article; nor was the term used by the court in the *Jones* case. It is quite clear, however, that this was the method employed. Dr. Solomon, of course, used the term in his correspondence with the writer. Letter from Dr. James Solomon, to the author, Feb. 11, 1955, on file Biddle Law Library, University of Pennsylvania Law School.

78. See articles cited in note 4 *supra*. See also O'KELLY, *INTRODUCTION TO PSYCHOPATHOLOGY* 655-57 (1949); STRECKER, *BASIC PSYCHIATRY* 306-08 (1952).

79. The advocated use of narcoanalysis in criminal interrogation has given rise to the phrase "truth serum." Actually, the drugs are not sera, and they do not invariably force the subject to tell the truth. The phrase is popular with feature writers for glossy paper magazines, but it has no significance in psychiatry. It is not the position of this author that the answers of a patient under narcosis are so accurate and truthful that the method should be used in and of itself as a means of lie detection in criminal investigation. The position of this author is, as expressed in the text, that the drug releases inhibitions and reveals personality characteristics. See Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 *YALE L.J.* 315 (1953); Redlich, Rabitz & Dession, *Narcoanalysis and Truth*, 107 *AM. J. PSYCHIATRY* 586 (1951); Muehlberger, *supra* note 4.



therapy. There are, of course, those who make great claims for its success,<sup>80</sup> and those who criticize it as overrated.<sup>81</sup>

In his correspondence with the writer, Dr. Solomon states his own opinion of the value of narcoanalysis.

"Narcoanalysis can frequently give more information on the personality traits of an individual. It is possible that just as much information, or nearly as much, might be obtained through a long time study of the patient, but in court problems, time and expense to the accused do not permit long range study of the individual. In this respect, narcoanalysis is an attempt at a short cut. Finally, the 'mystery' of being injected with a 'truth serum' plays upon the insecurity of the patient; he looks upon it as a kind of 'magical potion' which will outwit him, and therefore, he might as well tell the truth. (The similarity to the 'lie detector'). I do not tell patients it is a 'truth serum,' but frequently they surmise that it is. I prefer to state that it is a medicine to relax them so that they can talk about their lives, both past and present, without being upset. I prefer not to give them the idea of mysticism about it, though they may have it anyway. On rare occasions, one can acquire useful information by observing the attitude with which a subject accepts or rejects the use of narcoanalysis."

Falknor and Steffen attack the use of narcoanalysis as the use of "truth serum." They assert that no other appellate court has allowed its use and refuse to accept the distinction drawn by the court in the *Jones* case between exclusion of the statements of the defendant while under narcoanalysis to prove the truth of those statements, and allowing the psychiatrist to state his opinion regarding the personality traits of the defendant basing his opinion partly on an interview with the aid of narcoanalysis. The authors state that the psychiatrist must be assuming the truth of all of the answers to questions under narco-

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80. Horsley, *Pentothol Sodium in Mental Hospital Practice*, 1 BRIT. MED. J. 938 (1936); Lorenz, *Criminal Confessions under Narcosis*, 31 WIS. MED. J. 245 (1932); House, *The Use of Scopolamine in Criminology*, 18 TEX. STATE J. MED. 259 (1922). There are many published reports of the successful use of narcosis in war-neurosis. See GRINKER & SPIEGEL, *MEN UNDER STRESS* 170-78 (1945); SARGANT & SLATER, *op. cit.* *supra* note 4; see also Altman, *Neuroses in Soldiers: Use of Sodium Amytal as an Aid to Psychotherapy*, 3 WAR MEDICINE 267 (1943); Kubic, *Manual of Emergency Treatment for Acute War Neurosis*, 4 WAR MEDICINE 582 (1943); Hastings, Glueck & Wright, *Sodium Amytal Narcosis in Treatment of Operational Fatigue in Combat Air Crews*, 5 WAR MEDICINE 368 (1944); Cohen & Delano, *Subacute Emotional Disturbances Induced by Combat*, 7 WAR MEDICINE 284, 296 (1945); Gruber, *Narcosis in the Treatment of the Noncombatant Psychiatric Casualty Overseas*, 8 WAR MEDICINE 85 (1945).

81. Redlich, Ravitz & Dession, *supra* note 79. It should be noted, however, that in the later Yale article by Dession and Redlich the authors advocate the use of voluntary narcoanalysis to test insanity in criminal cases. See Dession, Freedman, Donnelly & Redlich, *supra* note 79, at 322-23; see also DAVIDSON, *FORENSIC PSYCHIATRY* 36-39 (1952).

analysis.<sup>82</sup> As pointed out previously,<sup>83</sup> this is actually not the case. The psychiatrist makes no such broad assumption. The purpose of the examination is not to prove the truth or falsity of certain statements; it is used as an aid in determining the personality makeup of the patient.

The opinion of an expert on a particular variant—such as the personality traits of an individual—is based on a vast composite of factors in the expert's background—in that which makes him an expert. These factors vary from the materials of his formal education, technical and non-technical; the courses of study, theoretical and practical, which he has taken; the variety of his experience; the scientific books and articles he has read. This is even before we add his actual examination of a patient such as Jones. The psychiatrists who examined Jones and formed and expressed opinions used all of this background plus certain actual techniques in their examinations. They relied on the "hearsay" of many other experts who formed their education and experience—none of which many courts would allow into evidence directly. And they also used narcoanalysis. Falknor and Steffen protest to the last—but why only the last?

In one of his less-known pioneer decisions,<sup>84</sup> Justice Holmes, while on the Supreme Judicial Court of Massachusetts, allowed a medical expert to testify on the effects of asphyxiation, though the expert admitted he received his basic data from a textbook and had never had practical experience with this kind of asphyxiation. Justice Holmes upheld admission of the expert's opinion asserting,

"[The expert's] general competency as an expert seems not to have been questioned; and, although it might not be admissible merely to repeat what a witness had read in a book not itself admissible, still, when one who is competent on the general subject accepts from his reading as probably true a matter of detail which he has not verified, *the fact gains an authority which it would not have had from the printed page alone*, and, subject perhaps to the exercise of some discretion, may be admitted."<sup>85</sup>

Holmes' statement goes to the heart of the matter. The court is not admitting the textbook, but the opinion of a qualified expert whose opinion is based partly on his *evaluation* of certain data, *i.e.*, the textbook.

The Holmes decision is only the beginning of a line of holdings of this type.<sup>86</sup> It is the theoretical basis of decisions allowing a quali-

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82. Falknor & Steffen, *supra* note 5, at 992-93.

83. See text at note 79 *supra*.

84. Finnegan v. Fall River Gas-Works Co., 159 Mass. 311, 34 N.E. 523 (1893).

85. *Id.* at 312-13, 34 N.E. at 523. (Emphasis added.)

86. Young v. Bates Valve Bag Corp., 52 Cal. App. 2d 86, 125 P.2d 840 (1942); Estes v. Denver & Rio Grand R.R., 49 Colo. 378, 113 Pac. 1005 (1911); Vigliotti v.

fied expert to testify in a New Hampshire court basing his opinion on reports he had read of the results of blood analysis tests conducted by experts in California,<sup>87</sup> and allowing a physician to testify as to his opinion of the physical and mental condition of a patient basing his conclusions on the patient's past and present medical history—a history which is often wholly hearsay.<sup>88</sup>

In the instant case, Dr. Solomon based his opinion of Jones largely on Jones' medical history, past and present. The history was given to him by Jones, partly in the first interview without narcoanalysis, and in the second with it. Both are hearsay. The interview with the aid of narcosynthesis was for the purpose of revealing inhibited personality traits which might not be revealed in the guarded statements in an interview without it, particularly where the patient is seeking the psychiatrist's opinion expressly for use in court for a particular purpose. If the opinion of Dr. Solomon is admissible at all, his evaluations of both interviews are admissible on the same grounds. Falknor and Steffen attack the admission of the opinion based on narcoanalysis on the ground that it was admitted "without any showing of scientific recognition of dependability."<sup>89</sup> But as pointed out, both interviews are hearsay and most scientists would give the second more, if not at least equal, reliability with the first. As to scientific recognition, the above decision of Holmes is the proper thesis. Expressed in terms of this case, the very fact that Dr. Solomon, with qualifications of the highest value,<sup>90</sup> uses the method and adds it to his conclusions is enough: (1) to show scientific recognition of its dependability, and (2) to insulate the court from using *only* the method and its results, and to enable the court instead to have Dr. Solomon's expert *opinion* based partly on his analysis of the results of the narcoanalytic method.

It is also not entirely correct that American appellate courts have uniformly rejected expert psychiatric opinion based partly on narcoanalysis. The New York Court of Appeals allowed such an opinion in *People v. Esposito*.<sup>91</sup> In that case the defendants pleaded insanity as a defense in a criminal case, and the trial judge had them hospitalized for psychiatric examination and observation. It would seem that the

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Campano, 104 Conn. 464, 133 Atl. 579 (1926); *Illinois Steel Co. v. Fuller*, 216 Ind. 180, 23 N.E.2d 259 (1939); *National Bank of Commerce v. New Bedford*, 175 Mass. 257, 56 N.E. 288 (1900); *Sundquist v. Madison Ry.*, 197 Wis. 83, 221 N.W. 392 (1928).

87. *State v. Sturtevant*, 96 N.H. 99, 70 A.2d 909 (1950).

88. See the excellent opinion of Judge Learned Hand in *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940).

89. Falknor & Steffen, *supra* note 5, at 993.

90. See note 12 *supra*, where some of these qualifications are set out.

91. 287 N.Y. 389, 39 N.E.2d 925 (1942).

defense was insanity both at the time of the commission of the crime and at the time of the trial. Narcoanalysis (using metrozol and sodium amytal) was utilized during the examinations conducted at a mental hospital. The defendants objected to the admission of any psychiatric opinion based on narcoanalysis. The psychiatrists testified that it was their opinion that the defendants were malingerers. The court of appeals affirmed the trial court in admitting the testimony. In that case as in the *Jones* case the court stressed the fact that the testimony was an expert opinion of mental condition and not an attempt to submit evidence of the truth of the statements made under narcoanalysis. The court asserted,

"The questions asked in this instance were quite evidently for the purpose, among others, of determining whether the defendants were capable of understanding the proceedings and of making their defense. Neither confessions of guilt nor admissions evidencing guilt were elicited. There was, therefore, no error committed."<sup>92</sup>

It must be admitted however that a later New York case, *People v. Ford*,<sup>93</sup> a per curiam decision without opinion, throws doubt on the position taken in the *Esposito* case. In the *Ford* decision, the court of appeals affirmed the trial court's refusal to allow a psychiatrist to testify in regard to an examination made under narcosis. Here the defense attempted to show that the accused was a "psychopathic personality," not insane, and was incapable of the premeditation and deliberation required for conviction of first degree murder. However, the psychiatrist was allowed to give an opinion on the mental condition of the defendant based on the other two interviews he had conducted without narcosis. The trial court did not allow him to testify in regard to the narcoanalysis, and, according to the dissent, stated its grounds for refusal was that such evidence had never been admitted in a New York court. The dissenting judge, Judge Desmond, in an excellent opinion,<sup>94</sup> pointed to the *Esposito* case but evidently was unable to convince the majority that the cases were analogous. It may be that the majority considered the *Esposito* case applicable only to an examination bearing on the defendant's mental condition for the purposes of trial. However, the defendants in that case pleaded insanity as a defense to the crime itself as well as insanity at the time of trial. The psychiatric evidence submitted was offered on both points. The court in the *Esposito* case asserted in regard to the use of narcoanalysis:

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92. *Id.* at 398, 39 N.E.2d at 929.

93. 304 N.Y. 679, 107 N.E.2d 595 (1952).

94. 304 N.Y. at 680, 107 N.E.2d at 595.

"Since [the defendants] desired to present their claims that they were not legally responsible for their acts because of mental defect they were subject to the use of methods set up objectively by the medical profession for the proper determination of such claims."<sup>95</sup>

The *Esposito* case still stands as a recognition by the New York courts that a psychiatrist's opinion based partly on narcoanalysis is admissible at least to show whether or not an accused has sufficient mental capacity to stand trial. The *Jones* decision lies more or less between the issues in *Esposito* and in *Ford*, and it is not clear what New York would do with a similar situation.

### CONCLUSION

The *Jones* decision in California is significant not only in challenging one "orthodox doctrine," but as evidence of the dynamic growth of our legal system in the area of proof.

As Judge Frank has so well expressed it, methods of proof are the heart of the law in action, in litigation.<sup>96</sup> *Stare decisis* has its necessary place in substantive law, but there should be no vested interests of litigants in the law of evidence. The courts must seek reality and truth by the best available methods and certainly cannot ignore scientific findings, analyses, opinions and methods—and these do not remain static.

In an address before the New York Academy of Medicine, Justice Cardozo asserted that:

"More and more we lawyers are awakening to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light."<sup>97</sup>

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95. 287 N.Y. at 397, 39 N.E.2d at 928.

96. FRANK, *COURTS ON TRIAL* (1950). Some suggestion of Judge Frank's views on the present subject is found in his expression of approval of the utilization on a broad scale of "testimonial experts" (trained psychologists and psychiatrists) to determine a witness' capacity to give testimony. *Id.* at 100. See also FRANK, *LAW AND THE MODERN MIND* (1930); Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO ST. L.J. 183 (1953); Frank, *Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

97. *What Medicine Can Do For Law* in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 373 (Hall ed. 1947).